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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

## No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## REPLY BRIEF OF PETITIONERS

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## Subject Index


I. Page

The facts in perspective ..... 1

II.

Undisputed facts and circumstances ..... 8

III.

As the Eleventh Amendment bars jurisdiction of the District Court in the underlying action, the discovery orders are void ..... 12

IV.

As the action as limited by plaintiffs bars the court's jurisdiction under 42 U.S.C. Section 1983, the discovery orders are void ..... 15

V.

As the orders compelling production of confidential state documents issued in derogation of the limitations imposed by the Fourth Amendment, they are invalid 17

A. An order pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure compelling production of documents is subject to the Fourth Amendment ..... 17

B. Reasonable expectations of privacy with respect to confidential state documents are protected by the Fourth Amendment ..... 19

C. An order compelling defendants to produce confidential state documents of which they are the custodians may be challenged by defendants on Fourth Amendment grounds ..... 21

D. As the orders compelling production are without statutory or constitutional authorizataion and as they are patently unreasonable, they contravene the Fourth Amendment ..... 22

VI.

Present status of the litigation in the District Court... 25

Conclusion ..... 26

## Table of Authorities Cited

### Cases


| | Pages |
|---|---|
| Barrows v. Jackson, 346 U.S. 249 (1953) | 22 |
| Black v. Sheraton Corp. of America, 50 F.R.D. 130 (DDC 1970) (Sirica, J.) | 3 |
| Black v. Sheraton Corporation of America, 371 F.Supp. 96 (D.C. 1974) | 2, 3 |
| Boyd v. United States, 116 U.S. 616 (1886) | 18 |
| Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974) | 5 |
| Ex parte New York, 256 U.S. 490 (1921) | 12 |
| Ex parte Young, 209 U.S. 123 (1908) | 12, 13 |
| Gerstein v. Pugh, 420 U.S. 103 (1975) | 22 |
| Governor of Georgia v. Madrazo, 1 Pet. (26 U.S.) 110 (1826) | 12 |
| Griswold v. Connecticut, 381 U.S. 479 (1965) | 20, 22 |
| Hagood v. Southern, 117 U.S. 52 (1886) | 13 |
| Hale v. Henkel, 201 U.S. 43, (1906) | 18, 21 |
| In re Ayeres, 123 U.S. 443 (1887) | 13 |
| McPhaul v. United States, 364 U.S. 372 (1960) | 18, 21 |
| Mancusi v. DeForte, 392 U.S. 364 (1968) | 21 |
| Morrissey v. Brewer, 408 U.S. 471 (1972) | 15 |
| N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) | 22 |
| Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946) | 18, 23, 24 |
| Oscanyan v. Arms Co., 103 U.S. 261 (1880) | 20 |
| Preiser v. Rodriguez, 411 U.S. 475 (1973) | 16 |
| Reck v. Pate, 367 U.S. 433 (1961) | 16 |
| Scheuer v. Rhodes, 416 U.S. 232 (1974) | 12, 14 |
| See v. City of Seattle, 387 U.S. 541 (1967) | 19, 21, 22 |
| United States v. Morton Salt Co., 338 U.S. 632 (1950) | 18 |
| United States v. Reynolds, 345 U.S. 1 (1953) | 1, 2, 4 |
| United States v. United States District Court, Northern District, Mich. et al., 407 U.S. 297 (1972) | 4 |
| Whiteley v. Warden, 401 U.S. 560 (1971) | 16 |




### Codes


| | Pages |
|---|---|
| Evidence Code: | |
| Section 1040 | 20 |
| Section 1040(a) | 19 |
| Section 1040(b) | 19 |
| Government Code: | |
| Section 6253 | 20 |
| Section 6254 | 19, 20 |
| Section 6255 | 19, 20 |
| Penal Code: | |
| Section 11105 | 19 |
| Sections 11140-11144 | 19 |


### Constitutions


| | |
|---|---|
| California Constitution: | |
| Art. I, Sec. 1 | 20 |
| Art. I, Sec. 24 | 20 |
| Art. I, Sec. 26 | 20 |
| United States Constitution: | |
| Fourth Amendment | 17, 18, 19, 21, 22, 23, 24 |
| Eleventh Amendment | 12, 13, 14, 23, 24 |


### Rules


| | |
|---|---|
| Federal Rules of Civil Procedure, Rule 37(a)(2) | 17, 18 |


### Statutes


| | |
|---|---|
| 28 U.S.C.: | |
| Section 2254 | 14, 16 |
| Section 2281 | 25 |
| 42 U.S.C.: | |
| Sections 1981, et seq. | 14 |
| Section 1983 | 15, 16, 17 |

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## REPLY BRIEF OF PETITIONERS

## I.

### THE FACTS IN PERSPECTIVE

Plaintiffs do not confront the question before the Court, but discuss strawmen and extraneous matter. Allegations concerning the functioning of the Adult Authority are yet to be litigated in the district court, but plaintiffs present them here as facts necessary to a proper resolution of pre-trial discovery questions (Respondents' Brief pages 4-11).[1] Plaintiffs discuss a line of case under *United States v. Reynolds,* 345

[1]These statements in Respondents' Brief belie plaintiffs' position that without the disputed documents they are required to litigate in the dark.

U.S. 1 (1953), without mentioning that the district court order (A. 648) precludes compliance with *Reynolds*.

Plaintiffs insist that defendants did not meet a burden of describing the documents and of making an evidentiary showing that privilege applies. Yet, defendants offered the *best evidence*—the documents themselves. This single circumstance obviates much of plaintiffs' brief which relies on cases, e.g., *Reynolds,* and *Black,*[2] whose stringent requirements assume the court will determine privilege only on the basis of the text of its assertion without an opportunity to actually examine the documents.

Plaintiffs urge at length that factual material, and something called "secret law," are not even confidential, let alone privileged (Respondents' Brief, pages 27-31). Putting aside for the moment the obvious point that any such material would be apparent to the court on an *in camera* inspection, the so-called factual material has been furnished (and described in Respondents' Brief, Statement of the Case, pages 9-10) in response to document demands not here at issue (e.g., A.51-56, Demands Nos. 12, 13). Plaintiffs also call the Court's attention to documents which form the basis for, or explain, agency decisions (Respondents' Brief, pages 28-29). But this information has been furnished in response to document demands not here at issue (e.g., A.51-56, Demands Nos. 2, 3, 4, 12, 13, 17). Plaintiffs' reference to "secret law" is equally perplexing as their argument cites as examples specific

[2]*Black v. Sheraton Corporation of America*, 371 F.Supp. 96 (D.C. 1974).



documents which have in fact been furnished (Respondents' Brief, page 30, footnote 14). See, A.51-56, Demands Nos. 2, 3, 4).

Plaintiffs appear most fascinated by a statement in *Black v. Sheraton Corporation of America, supra* which is quoted three times early in Respondents' Brief, and then, lest it might be overlooked, is repeated much later:

> "The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for just resolution of a legal dispute." *Black, supra,* 371 F.Supp. at 100 (Respondents' Brief, pages 22, 32, 33, 61).

This statement assumes that every document demanded is necessary to a just resolution of a legal dispute. The thought in the statement could be applicable *only* where privilege is asserted for a document without which the proponent of its discovery could not proceed with its case.[3] The statement does not apply to *any* claim of executive privilege, and plaintiffs' willingness to proceed with trial without any of the documents here at issue concedes the documents are not needed for just resolution of this legal dispute in the district court.[4]

[3]Plaintiffs have asserted in this Court their willingness and ability to proceed to trial without any of the documents at issue (Plaintiffs' Memorandum Regarding Suggestion of Mootness).

[4]In any event, plaintiffs' position is more closely analogous to the earlier opinion in *Black* where the district court denied demands for the information because its confidentiality outweighed plaintiffs' need for it in light of available alternate sources of information—depositions of FBI agents. *Black v. Sheraton Corp. of America*, 50 F.R.D. 130 (DDC 1970) (Sirica, J.) [See, 371 F. Supp. at 99].

Plaintiffs attack the *in camera* proceeding as subversive of the adversary system, as beyond the competence of district judges to reach an informed determination, and as a burden on the courts.[5] (Respondents' Brief, pages 45-60). This Court has recognized the capacity of district judges to evaluate exceptionally complex and subtle considerations at ex parte non-adversary proceedings. *United States v. United States District Court, Northern District, Mich. et al.*, 407 U.S. 297, 320-321 (1972).

Plaintiffs suggest the government could frustrate discovery altogether by asserting confidentiality, and necessity for an *in camera* inspection, for masses of documents too great for the court to handle. (Respondents' Brief, pages 54-55). But the other side of this coin is the plaintiffs' tactic of indiscriminately demanding a mass of documents too great for a department head to handle for purposes of asserting particularized privilege under *Reynolds* procedures. Indeed, were the department head to comply with *Reynolds*, and demand an *in camera* inspection, the problem suggested by plaintiffs would be unavoidable.

Plaintiffs would enforce their dislike of *in camera* inspections by imposing five prerequisites (Respondents' Brief, pages 56-57), but fail to explain how these could be met under a Court order which states:

[5]Defendants do not dispute that in camera inspections "burden" the courts. Such matters, however, may be referred to magistrates (as have all discovery questions in this case). Also, the burden is necessary, and is cast as much by the indiscriminate scope of plaintiffs' demands as by defendants' interest against an unnecessary disclosure of concededly confidential documents.



> "All such central files made available upon request by plaintiff[s] shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A.648).

Respondents' Brief also refers repeatedly to the opinion in *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974), [Respondents' Brief, pages 29, 31, 47, 57], a case where (1) the government agreed that disclosure of the material in question was warranted; (2) the documents in question referred to matters *adopted* by the agency [compare, A.51-56, Demands Nos. 2 and 3]; (3) there was an *in camera* inspection in the district court; and (4) the Court of Appeals did not totally brush aside the interest of the government but remanded for further proceedings designed expressly to protect that interest. *Id.*, 484 F.2d at 1090. In this case, the State disputes that disclosure of the documents is warranted; matters adopted by the government as basis for decision have been discovered in response to other document demands; there was no *in camera* inspection whatsoever in the district court; and the district court order irretrievably brushes aside any opportunity to further raise, let alone actually protect, the legitimate interest of the government.

As matters now stand, plaintiffs are authorized to designate any two hundred central files maintained on prison inmates, whereupon "all such central files made

available upon request by plaintiff[s] shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A.648).

Contrast this inflexible directive with defendants' suggested procedure whereby plaintiffs would identify the inmate by name; the defendant having custody of the government's file on that inmate would examine it and remove confidential material, if any; the removal of such material would preliminarily be subject to negotiation with counsel upon further specificity by plaintiffs of their need for the document; and failing such negotiation the document would be submitted to the district court together with reasons for separating it from the otherwise discoverable contents of the file. (A.476, 525-528, 539-540, 586-587, 599-600). Notwithstanding this proposal, in September 1974, when plaintiffs asked for the files of 22 inmates by name, and when defendants informed the plaintiffs that they were retaining only certain specified and identifiable items for *in camera* inspection by the court, plaintiffs responded by filing a motion to compel full, unrestricted disclosure (A.446-456). Upon hearing this motion, the district court found that the preliminary withholding of any document was unauthorized by court order and threatened defendants and their counsel with contempt in the event of any reoccurrence. The order of December 3, 1974, under review here,



makes the right to claim confidentiality and privilege, asserted on behalf of independent State interests, null and void.

The central files are government files maintained by defendants on individual prison inmates. Defendants sought only to limit immediate access to those documents in the files which are in fact confidential and believed to be privileged under the circumstances of this case, and the opportunity, through their state Attorney General, to assert their claims of qualified privilege to the district court for resolution by an informed balancing of interests. Both the authority to preliminarily withhold and the opportunity to be heard have been denied.

No more was asked by defendants when also confronted with the demand for the personnel files maintained on themselves and on each hearing officer of the Adult Authority. It is difficult to perceive a discovery request more invasive of personal privacy or more likely to abuse or harass an individual, both litigant and nonlitigant. The problem is especially severe in this action initiated by state prisoners against their custodians. Accordingly, defendants asked for an *in camera* inspection of the personnel files. This was rejected outright:

> "[T]hat defendants' request for an *in camera* inspection of the personnel files for a determination of the relevance and a balancing of the materiality of their contents prior to release of the files to plaintiffs is denied." (Petition for Certiorari, Appendix, pp. xvi-xvii).

Since the grant of certiorari, plaintiffs have been permitted to select and inspect numerous central files subject to defendants' removing confidential matter. (See, Petitioners' Brief, pp. 23-24, and appendix thereto, pp. i-v). Plaintiffs have not been permitted to examine the contents of personnel files. This procedure has not affected plaintiffs' desire for immediate trial.

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## II.

### UNDISPUTED FACTS AND CIRCUMSTANCES

Many facts and circumstances important to the Court's consideration of this matter are not disputed:

(1) The district court's discovery orders compel the defendants to produce confidential state government documents for adversary inspection. The confidential nature of *all* contents of inmate files was acknowledged by plaintiffs in their request to inspect them. A.234-235).[6] The recognition by the magistrate and by the district judge of the confidential nature of the contents of inmate files, and the personnel files is reflected in their protective orders [Personnel files: Petition for Certiorari, appendix pages xix-xx (magi-

[6]Plaintiffs' letter requesting access to inmate files states:

> "Naturally we would expect to treat this information in the strictest confidence, respecting its confidentiality in all respects, and we would be prepared to stipulate to a protective order indicating that we would not share this information with our clients or with anyone else, but would collect, collate and organize it for presentation to the court in this case. I do not think that this stipulation would be a problem since we are prepared to respect the confidential nature of the material. The names of these prisoners in every 20th file need not appear, or can be submitted *in camera*." (A.235).



strate); Petition for Certiorari, appendix page xvi (district judge). Inmate files: Petition for Certiorari, appendix pages xix-xx, xl (magistrate); Petition for Certiorari appendix pages xvi, xxxi-xxxii; (district judge). A.647, 649-650 (district judge)]. That the documents in question, other than inmate files and personnel files, are also of a confidential nature is recognized by plaintiffs where they state in their Respondent's Brief:

> "Although this protective provision, subsequently adopted as the order of the court, covers only the personnel files, plaintiffs would not object to an order extending it to the other documents here at issue." (Respondent's Brief, page 15, footnote 10).

(2) Confidentiality, and privilege, may be *asserted* not only as to particular documents, but also as to a class of documents (A.719, opinion of Court of Appeals; Respondent's Brief, pages 16, 19, 42). The "personnel files" comprise such a class of documents, as do the confidential portions of inmate files. The numerous categories of governmental memoranda demanded by plaintiffs comprise classes of documents the precise specification of which appears in the text of plaintiffs' demands for them.[7] The *determination* of privilege may, under defendants' offer, be made upon actual examination of any or all of the documents.

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[7]The text of plaintiffs' demands for documents at issue in this action (other than the contents of inmate files and personnel files) appears at A.54-56, Items No. 14, 15, 18, 20, 21, 22.

(3) The district court examined none of the confidential documents ordered to be produced directly to plaintiffs' counsel, and expressly denied defendants' request for such an examination.

(4) The withholding of *any* documents from inmate files to be produced directly to counsel is viewed by the district court as a violation of its orders and punishable by contempt.[8]

(5) The documents in fact are not necessary to plaintiffs' case, and plaintiffs are willing, if not also anxious, to proceed to trial without the documents. This circumstance is amply demonstrated by plaintiffs' assertions of mootness heretofore filed in this Court. Plaintiffs' statements of their need for the documents (Respondent's Brief, Argument II, pages 60-80) should be presented to the district court for an informed *in camera* determination rather than to this

[8]The opinion of the Court of Appeals states that defendants may seek an *in camera* inspection at the time the documents are discovered in the district court (A.719). But this dicta would apply only to the personnel files and memoranda, and not to the inmate's files. The same Court of Appeals judges had one month earlier summarily rejected mandamus (A.199) to review the order compelling production of inmate files even though that order (A.647-650) by its terms required production directly to counsel of the entire contents of any 200 such files to be designated in the future —thus precluding any opportunity for such an *in camera* inspection as well as any opportunity to defendants to assert privilege upon actual examination of the documents before releasing them to the adversary. Finally, had particular documents been sealed and presented for *in camera* inspection "at the time of discovery in the district court," the district judge would certainly have rejected the tender (compare, *Enomoto v. United States District Court, Northern District of California*, No. 74-1499 (Petition for Writ of Certiorari, pages 8-11, filed May 29, 1975), and considered the matter a violation of its order.



Court as a basis for denying any *in camera* proceeding below.[9]

(6) The merits of the action in the district court, the discovery sought by plaintiffs, and the discovery orders are all intended to run against, and all in fact run against, the State government.

(7) In the action in the district court plaintiffs do not challenge or seek to overturn any agency or administrative decision. (Respondent's Brief, pages 22-23, 78).

(8) Plaintiffs have abandoned their claims for relief at parole rescission, parole revocation, and prison disciplinary proceedings and have limited the action in the district court to parole consideration—term fixing proceedings. (Respondent's Brief, page 6, footnote 3).

[9]Plaintiffs' assertions nevertheless fail to inform this Court that the information they now claim they seek in these documents has been provided. Extensive biographical backgrounds of Adult Authority members and hearing representatives were furnished in response to interrogatories (A.323-325, Interrogatories No. 1 through 5) and depositions (see A.309-311). Rules, regulations, policies, procedures, statistics, reports, speeches, etc. were furnished in response to plaintiffs' demands for documents (A.51-56, Demands Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 19). Dozens of inmate files have been inspected by plaintiffs for mistakes, etc. (e.g. A.497-524; Brief of Petitioners, appendix pages i-v).

## III.

**AS THE ELEVENTH AMENDMENT BARS JURISDICTION OF THE DISTRICT COURT IN THE UNDERLYING ACTION, THE DISCOVERY ORDERS ARE VOID.**

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to *any suit in law or equity,* commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." (emphasis added).

This amendment applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Ex parte Young,* 209 U.S. 123, 150 (1908); *Ex parte New York,* 256 U.S. 490, 497-498 (1921).

The Eleventh Amendment bars suits not only against the State when it is named as a party, but also when it is the party in fact. *Scheuer v. Rhodes,* 416 U.S. 232, 237, 238 (1974) (and cases there cited). Whether the Eleventh Amendment applies "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceedings as it appears from the entire record." *Scheuer v. Rhodes, supra,* 416 U.S. at 237.

*Ex parte Young, supra,* 209 U.S. at 150-51, states (1) that where the demand is against an officer of the State not personally, but officially, the State is a party and the suit is barred (citing *Governor of Georgia v. Madrazo,* 1 Pet. [26 U.S.] 110, 122, 123 (1826)); (2) that the same is true of demands against



officers of the State who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State [citing *In re Ayeres,* 123 U.S. 443 (1887)]; (3) that a suit cannot be maintained to compel the performance of an obligation which could only be performed by the State as where the things to be done by the actual defendants are the very thing which when done would constitute performance of an obligation of the State [citing *Hagood v. Southern,* 117 U.S. 52, 67 (1886)].

Such actions simply attempt to make the State itself, through its officers, perform an alleged obligation by directing State officers to do acts which constitute such performance. Under these circumstances the State alone has an interest in the question, and a decree in favor of plaintiffs would affect the treasury of the State. *Ex parte Young, supra,* 209 U.S. at 151. Respondents' Brief not only concedes, it asserts that the underlying action in the district court, as well as the discovery orders themselves, are intended to be, and in fact are directed against the State. (e.g., Respondents' Brief, pages 23, 86).

Plaintiffs seek no negative injunctive relief, but do seek a declaratory judgment and mandatory injunctive relief requiring substantial affirmative action by the State government (A.45-47).[10] The negative injunctive relief ruled proper in *Ex parte Young, supra,* was viewed an exception to the Eleventh Amendment

[10]The scope of the mandatory injunctive relief has been narrowed substantially by plaintiffs through successive amendments to their complaint. (See Respondents' Brief, page 6, footnote 3). Nevertheless, plaintiffs have never suggested an interest in negative injunctive relief.

bar because the injunction prohibited the enforcement of an unconstitutional statute, an illegal act, done not by the State, but by an individual who could be enjoined. Similarly, in *Scheuer v. Rhodes, supra,* it was necessary for this Court to conclude that "petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under the state law." [emphasis by the Court]. 416 U.S. at 238. This determination was necessary to save from the Eleventh Amendment bar the claims of plaintiffs for monetary damages.

The district court's jurisdiction to adjudicate claims of deprivations of federal rights under color of State law exists only because of a statute—Title 42 United States Code, section 1981, et seq. These sections cannot be used to pursue relief in a manner which is barred by the Eleventh Amendment, as the statute, and practice under it, must yield to the Constitution. This does not leave plaintiffs without means to vindicate their asserted interests as proceedings under Title 28 United States Code, section 2254 are available, under appropriate circumstances, in a separate action (see footnote 12, infra, page 16).

As the district court's jurisdiction in the underlying action is thus barred, the discovery orders, which are a part of that action, must be void. Accordingly, even under the most stringent standard for mandamus these orders of a Court without jurisdiction should be vacated.



## IV.

### AS THE ACTION AS LIMITED BY PLAINTIFFS BARS THE COURT'S JURISDICTION UNDER 42 U.S.C. SECTION 1983, THE DISCOVERY ORDERS ARE VOID.

Plaintiffs, through successive amendments to the complaint, have narrowed the action in the district court so that it is "concerned solely with the term-fixing, parole granting hearings . . ." conducted by the Adult Authority. (Respondents' Brief, page 6, footnote 3). Whether and, if so, what process is due at a particular parole or term fixing proceeding depends on the prisoner's interests which are at stake at that proceeding. E.g., *Morrissey v. Brewer,* 408 U.S. 471, 481-482 (1972). Proceedings on parole granting and fixing of terms concern directly the fact or duration of a prisoner's custody. It is only these interests which could afford a basis for determining what process, if any, is due at such proceedings. A claim that due process is denied at parole grant or term fixing procedures which does not also carry with it a further claim that the result of such procedures is invalid under the Constitution, fails to present the only interest, liberty, which would constitute a basis for a claim to which due process might attach.[11]

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[11]Plaintiffs nevertheless insist they do not attack the correctness of any agency decision and do not seek to challenge or overturn any administrative decision by the underlying litigation in the district court (Respondents' Brief pages 22-23, 78). If this assertion is accepted, plaintiffs not only abandon their claim for liberty to which due process might attach but they also withdraw from the district court their case or controversy, render the litigation in the district court academic, and withdraw a basis for the district court's jurisdiction.

In *Preiser v. Rodriguez,* 411 U.S. 475 (1973), this Court held that where state prisoners challenge state administrative action directly affecting the fact or duration of their confinement, the sole federal remedy is appropriate proceedings in habeas corpus under Title 28 U.S.C. section 2254, and that relief under Title 42 U.S.C. section 1983 is unavailable because it would frustrate explicit congressional intent. *Id.* 411 U.S. at 489-490, 500.

A challenge to confinement is a habeas corpus matter. The appropriate relief is an alternative writ requiring either correction of the illegality affecting the length or duration of confinement or outright release from custody. See *Whiteley v. Warden,* 401 U.S. 560, 569 (1971); *Reck v. Pate,* 367 U.S. 433, 444 (1961). The nature of the requested relief and of the prisoner's interest cannot be changed simply by an assertion that only the procedures are being challenged and not the confinement itself. "It would only frustrate explicit congressional intent to hold that the [state prisoners] could evade this requirement [of exhaustion of state remedies] by the simple expedient of putting a different label on their [requested relief]." *Preiser v. Rodriguez, supra,* 411 U.S. 475, 498-590.[12]

For the above reasons the district court's jurisdiction over the action as limited by plaintiffs is barred

[12]Plaintiffs' failure to have exhausted available state remedies, and their refusal to challenge the validity of any particular administrative decision or to request relief from custody all preclude an opportunity to convert the underlying action, or to add to the underlying action, habeas corpus proceedings under Title 28 U.S.C. section 2254.



under 42 U.S.C. section 1983 and the discovery orders issued in the action must be void.

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## V.

### AS THE ORDERS COMPELLING PRODUCTION OF CONFIDENTIAL STATE DOCUMENTS ISSUED IN DEROGATION OF THE LIMITATIONS IMPOSED BY THE FOURTH AMENDMENT, THEY ARE INVALID.

Defendants' reliance upon the Fourth Amendment is not novel; rather, it is plaintiffs' reliance upon federal civil discovery procedures to indiscriminately obtain confidential State documents which is unique. Compulsory process is not exempt from the Fourth Amendment, and custodians of documents sought are not without authority to invoke the protection of the Fourth Amendment. The limitations inherent in the guarantee of the Fourth Amendment have been explicitly delineated, and the duty of determining that the limitations have not been breached devolves upon the judiciary. The district court abdicated its responsibility to arrive at an informed determination that the disclosure sought was justifiable, and the resulting orders are thus void under the Fourth Amendment.

#### A. An Order Pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure Compelling Production of Documents is Subject to the Fourth Amendment.

Plaintiffs err in assuming that a mere assertion that documents are sought for use in litigation serves to abrogate Fourth Amendment rights. The applicability of the Fourth Amendment to the compulsory

production of documents is sustained by history, is enunciated in explicit language by this Court, and is exemplified by a variety of decisions.

In 1886, this Court recognized that the essence of a search and seizure is not the physical intrusion and taking of property, but rather is the element of compulsion to produce that which is otherwise protected. *Boyd v. United States,* 116 U.S. 616, 621-622 (1886). This Court has observed that "the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' (citation omitted), is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process (citations omitted) . . ." *United States v. Morton Salt Co.,* 338 U.S. 632, 651-652 (1950). This Court has considered the applicability of the Fourth Amendment to various forms of compulsory process. *See Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 208-214 (1946) [administrative subpoena duces tecum]; *McPhaul v. United States,* 364 U.S. 372, 382-383 (1960) [congressional subpoena dues tecum]; *Hale v. Henkel,* 201 U.S. 43, 71-77 (1906) [grand jury subpoena dues tecum].

History and precedent mandate the conclusion that an order pursuant to Rule 37(a)(2) compelling the production of documents is subject to the limitations inherent in the Fourth Amendment. As succinctly stated by this Court: "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel, supra,* 201 U.S. 43, 76 (1906); *see*



*also See v. City of Seattle,* 387 U.S. 541, 544-545 (1967). Accordingly, plaintiffs' assertion that the documents are sought for use in litigation merely prefaces the issue of whether production can be compelled consistently with the Fourth Amendment.

### B. Reasonable Expectations of Privacy With Respect to Confidential State Documents are Protected by the Fourth Amendment.

Plaintiffs' inability or refusal to perceive the Fourth Amendment interests which are at stake results from plaintiffs' misconception of the nature of the documents ordered to be produced and of the expectation entitled to be protected.

Plaintiffs first err in founding their observations on the assertion that the orders are directed to "admittedly public documents." (Brief of Respondents at p. 85). As a matter of State law, the documents sought are not available to the public (Cal.Gov. Code §§ 6254(a),(c),(f),(k), and 6255; Cal.Pen.Code § 11105),[13] and are subject to a claim of privilege in judicial proceedings (Cal.Evid.Code § 1040(a), (b)).[14] Insofar as the documents may contain certain criminal record information, unauthorized disclosure or receipt is a criminal offense (Cal.Pen.Code §§ 11140-11144).

Plaintiffs next err in assuming that it must be expected "that the government will utilize [informa-

[13] These code sections are set forth at pp. v.vi and xii-xiii of the Appendix of the Brief for Petitioners.

[14] These code sections are set forth at pp. xiii-xiv of the Appendix of the Brief for Petitioners.

tion] as it sees fit, and may disclose it to a number of individuals in a variety of situations, including court-ordered discovery." (Brief for Respondents, p. 85). State officers do not have discretion to either withhold or disclose information as they see fit. Plaintiffs' reference to "court-ordered discovery" (*Ibid.*) assumes the facts and law at issue.

If by virtue of State law the information is to be made available to the public (*See* Cal.Gov.Code § 6253), the state officer's duty is to disclose it upon demand. If by virtue of State law the information is not available to the public and is subject to a claim of privilege (*see* Cal.Gov.Code §§ 6254-6255; Cal. Evid.Code § 1040), the state officer's duty is to assert the confidentiality of the documents. In short, it is the state officer's duty to insure that the information will not be disclosed without a determination that the need for disclosure outweighs the need for confidentiality.

The " 'right to privacy, [is] no less important than any other right carefully and particularly reserved to the People.' (Citations omitted)." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Moreover, it should be noted that the Constitution of California expressly guarantees the right to privacy (Constitution of California, Art. I, § 1). State officers are no more and no less than the agents of the People (*see* Constitution of California, Art. I, §§ 24 and 26). "All such positions are trusts to be exercised from considerations of duty and for the public good." *Oscanyan v. Arms Co.*, 103 U.S. 261, 273 (1880).



Accordingly, the reasonable expectation with respect to information contained in confidential documents is that such information will not be disclosed unless it is found that the justification for disclosure clearly outweighs the reasons for confidentiality. As this expectation is reasonable, the fact that it is not an expectation of absolute privacy does not deprive it of Fourth Amendment protection. *See Mancusi v. De Forte,* 392 U.S. 364, 369-370 (1968).

### C. An Order Compelling Defendants To Produce Confidential State Documents of Which They Are the Custodians May be Challenged By Defendants on Fourth Amendment Grounds.

The protection of the Fourth Amendment is not limited solely to private papers which are possessed by a person in his individual capacity. In a variety of contexts, this Court has considered Fourth Amendment challenges by custodians of documents. *See Hale v. Henkel, supra,* 201 U.S. 43, 76-77 (1906) [custodian of corporate records]; *McPhaul v. United States, supra,* 364 U.S. 372, 382-383 (1960) [custodian of organization records]; *Mancusi v. DeForte, supra,* 392 U.S. 364, 367-370 (1968) [custodian of union records]. In *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967), this Court observed that it was now settled that a subpoena of an administrative agency for corporate books and records must meet certain standards required by the Fourth Amendment. Conversely, it is thus settled that custodians of such records may object to subpoenas if they do not meet the standards of the Fourth Amendment.

State officers hold confidential documents as fiduciaries of the Public. Unless government officers who have control over confidential documents assert the People's right to privacy, it could be effectively diluted. *Cf. Griswold v. Connecticut, supra,* 381 U.S. 479, 481 (1965). In some circumstances, to require those whose privacy might be invaded to intervene to seek to restrain compliance with a motion to produce documents might result in an abrogation of their rights at the very moment they are asserted. *Cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 459 (1958). When it is the action of a court which might result in the denial of a constitutional right, that right may be irreparably abridged if it is not asserted by a party to the litigation. *See Barrows v. Jackson,* 346 U.S. 249, 257 (1953). Given plaintiffs' motions to compel and the district court's resulting orders, the suggestion that defendants' Fourth Amendment challenge is premature is without merit.

**D. As the Orders Compelling Production are Without Statutory or Constitutional Authorization and as They are Patently Unreasonable, They Contravene the Fourth Amendment.**

At the core of the Fourth Amendment is the requirement of an informed determination by a judicial officer that there is justification for the action which is to be taken. *See Gerstein v. Pugh,* 420 U.S. 103, 112-113 (1975); *see also See v. City of Seattle, supra,* 387 U.S. 541, 544-545 (1967). Accordingly, before compulsory process may issue, the court must find as follows: first, that it is authorized by statute; second, that the statute so construed is authorized



by the Constitution; third, that the documents sought are within the scope of the authorization; and fourth, that the specification of the documents to be produced is adequate, but not excessive, for purposes of the authorized inquiry. *See Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946).

The orders of the district court, compelling the production of confidential state documents, issued in derogation of the Fourth Amendment because the district court abdicated its responsibility of arriving at an informed determination of these four considerations (Brief for Petitioners, pp. 58-72).

The failure of the district court to make an informed finding as to whether the orders were authorized by the Constitution is of particular significance for it constituted a failure to determine if the district court had jurisdiction to order production of all the documents. This jurisdictional cloud arises because the orders are not concerned with obtaining discovery from individual defendants, but rather with obtaining discovery from the State; the Eleventh Amendment explicitly limits federal judicial power over the states (Brief for Petitioners, pp. 61-67).

Responding to defendants' Fourth Amendment claims, plaintiffs characterize the proceedings as follows: "In this case the 'seizure', although compelled by a Federal court, operates to place documents in the hands of private citizens for use in suing the government, . . ." (Brief of Respondents, p. 86). Plaintiffs agree that the orders are concerned with obtaining discovery against the State, and assert that the

suit itself is brought against the State. As the district court has no jurisdiction over the underlying action because it is barred by the Eleventh Amendment, clearly the district court has no jurisdiction to issue the orders compelling production of confidential state documents. (Argument III, *supra,* p. 12).

Accordingly, plaintiffs' attempt to obviate defendants' Fourth Amendment claims by asserting that the orders concern "discovery of documents from the government for use against the government in civil litigation" (Brief of Respondents, p. 23) is inherently defective. The Fourth Amendment precludes the issuance of compulsory process without "the court's determination that the investigation . . . , is for a purpose Congress can order, . . . " *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946). Federal power to authorize compulsory process against a state is necessarily circumscribed by the Eleventh Amendment. By refusing to examine the state documents *in camera,* the district court abdicated its responsibility of determining whether or not it had jurisdiction under the Eleventh Amendment to order the production of the documents. Accordingly, the orders issued in derogation of a basic requirement of the Fourth Amendment.



## VI.

### PRESENT STATUS OF THE LITIGATION IN THE DISTRICT COURT

After the filing of the second amended complaint, defendants gave notice of the requirement of a three-judge district court under Title 28, United States Code Section 2281. On October 20, 1975, the district court certified the action to the Chief Judge of the United States Court of Appeals as one appearing to require the convening of such a specially constituted court.

At a pretrial conference on October 23, 1975, plaintiffs announced that they were abandoning all claims which might call for a three-judge court and pressed for immediate trial before the single judge on the remaining claims. (See Respondents' Brief, page 6, footnote 3 ). The district court (1) set aside the previously fixed trial date, November 10, 1975; (2) directed plaintiffs to file by October 28, 1975, a memorandum setting forth the claims they were seeking to dismiss, stating the remaining relief sought and arguing their reasons why the action should not be tried by a three-judge court; (3) afforded defendants until November 3, 1975, to reply; and (4) continued further hearing until November 13, 1975.

No trial date is set before either a three-judge court or a single-judge court.

## CONCLUSION

For the above reasons, Petitioners request that the orders of the Court of Appeals, and of the district court be vacated, and that the case be remanded with directions that the underlying action in the district court be dismissed, or production of the confidential documents not be compelled without a prior *in camera* inspection and informed determination by the district court that plaintiffs' need for the documents in the action below outweighs their confidentiality.

Dated, November 6, 1975.

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